UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PRINCERIDGE GROUP LLC,

Plaintiff,

-against-

OPPIDAN, INC.,

Defendant.

Case No. 11 CV 1460 (AJN)

Civil Action

MEMORANDUM OF LAW ON BEHALF OF THE PRINCERIDGE GROUP LLC IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The PrinceRidge Group LLC ("PrinceRidge" or "Plaintiff")[1] respectfully submits this Memorandum of Law in support of its motion for summary judgment seeking adjudication of this straightforward breach of contract claim against defendant Oppidan, Inc. ("Oppidan"). In April, 2010, PrinceRidge, a FINRA regulated broker/dealer, and Oppidan, a merchant development company, entered into an exclusive agreement whereby PrinceRidge agreed to provide financial advisory services to Oppidan regarding a portfolio of distressed real estate. The portfolio consisted of 16 Oppidan owned retail properties (the "Properties" or the "Portfolio") leased to retailers Gander Mountain and Camping World. PrinceRidge provided financial advice to Oppidan regarding the portfolio of properties, and contacted numerous parties in an effort to locate potential investors willing to invest in Oppidan's real estate. Pursuant to the agreement, if PrinceRidge introduced a person or entity to the transaction Oppidan sought to consummate (the sale of the properties), and that person or entity successfully negotiated with Oppidan to purchase some or all of the properties contained in the Portfolio, then PrinceRidge would be entitled to a "success fee" of 1.875% of the purchase price.

Upon execution of the exclusive agreement, PrinceRidge assembled a detailed booklet entitled "discussion materials" regarding the Properties and began making contacts with investors that may be interested in the transaction. One of those entities was National Retail Properties ("NRP"), a Real Estate Investment Trust. NRP expressed a high level of interest, and apprised PrinceRidge Managing Director Matt Kirsch that NRP was prepared to submit a bid to Oppidan to purchase some of the Properties.

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[1] On or about January 3, 2013, PrinceRidge formally changed its name to "C&CO/PrinceRidge LLC". Counsel will take the necessary steps to amend the caption of this lawsuit. For ease of reference herein, we refer to PrinceRidge as set forth in the current caption.

Shortly before NRP was to submit its bid, however, NRP's vice-president, Jay Bastian, abruptly informed Kirsch that NRP would not "participate in PrinceRidge's process." PrinceRidge subsequently learned that NRP bypassed PrinceRidge, dealt with Oppidan directly, and that NRP ultimately purchased ten (10) of the Portfolio properties for over $100 million. Contrary to the express terms of the exclusive agreement, Oppidan refused to pay PrinceRidge the agreed upon Success Fee (and other fees earned by PrinceRidge in accordance with the parties' written agreement).

Oppidan has blatantly disregarded its contractual responsibilities to pay PrinceRidge for the valuable services that led to a $100 million payday for Oppidan. Without question, Oppidan breached its exclusive contract with PrinceRidge. As a result of Oppidan's breach, PrinceRidge has suffered damage in the amount of approximately $2 million. Oppidan cannot be permitted to continue to deny PrinceRidge the fee it rightfully earned.

Each and every element necessary to prove Oppidan's breach has been established through both documentary and other evidence procured through discovery, which includes: 1) the existence of a valid contract; 2) proof of PrinceRidge's performance; 3) Oppidan's blatant breach; and 4) the resulting damages to PrinceRidge as a result of Oppidan's breach. Accordingly, for the reasons set forth below, PrinceRidge respectfully requests that the Court award PrinceRidge summary judgment regarding its breach of contract claim.

STATEMENT OF FACTS

The Parties

PrinceRidge is a FINRA regulated broker/dealer that provides, among other things, financial advisory services to corporations seeking assistance in dealing with the acquisition and disposition of assets. See Declaration of Matthew Kirsch in Support of PrinceRidge's Motion for Summary Judgment ("Kirsch Decl.") ¶ 2. In the spring of 2010, Oppidan contacted

PrinceRidge seeking advisory services regarding a portfolio of sixteen (16) Oppidan owned underperforming properties (the "Properties" or the "Portfolio") that were leased at that time to primarily retailers Gander Mountain and Camping World. Id. Oppidan is a merchant development company that purchases land, constructs retail buildings, leases those buildings to various retailers, and then sells the buildings outright. (See Deposition of Oppidan President Joe Ryan ("Ryan Dep.") attached to the Kirsch Decl. as Exhibit "A"; 13:3-9; 20:2-14.)

The Exclusive Engagement Agreement

In the Spring of 2010, PrinceRidge Managing Director Matthew Kirsch participated in a number of conference calls with Oppidan President Joe Ryan, so as to allow PrinceRidge to familiarize itself with Oppidan's business and determine the scope of services required by Oppidan. Thereafter Kirsch met with Ryan in an effort to learn about Oppidan and discuss the engagement. Ryan Dep. 34-35; Deposition of Matthew Kirsch Volume I ("Kirsch Dep. I") attached to the Kirsch Decl. as Exhibit "B"; pp. 86 – 87. Those discussions revealed three potential methods of resolving the financial issues Oppidan faced at that time: 1) refinancing the existing debt; 2) renegotiating the loans with existing lenders; or 3) the disposition of the Properties through sales. (See Kirsch I 16 – 17:18 - 5, 42:15-20; Ryan Dep. 34 – 35.)

Ultimately it was determined that the third option, a sale of the Properties, was the best course of action. Ryan Dep. 35:14-15. PrinceRidge prepared an engagement letter that outlined the advisory services that PrinceRidge would continue to provide (the "Exclusive Engagement Agreement"). On or about March 19, 2010, Kirsch forwarded a draft Exclusive Engagement Agreement to Oppidan. (See March 19, 2010 email and draft Exclusive Engagement Agreement attached to the Kirsch Decl. as Exhibit "C".) The initial draft of the Exclusive Engagement Agreement provided, in relevant part, as follows:

- Paragraph 1(a) – Oppidan agrees to retain PrinceRidge as it's "**exclusive advisor"** in connection with the "**Advisory Services"**, which were defined to include: "(i) in cooperation with [Oppidan] familiarize itself with the properties, business, operations, financial condition, management and prospects of the portfolio, (the 'Assets'); (ii) **introduce** [Oppidan] to potential buyers of the Assets; and (iii) provide such other **advisory and investment banking services** upon which the parties may mutually agree. (emphasis added)

- Paragraph 3(a)[2] – Oppidan agrees to pay PrinceRidge 2.0% of the sales price in consideration with the "**Advisory Services**" provided in Paragraph 1(a) (the "Success Fee").

- Paragraph 3(c) - If within 18 months from the effective date of termination of the Contract, Oppidan consummates a sales transaction on any property to a buyer whom Oppidan was **introduced to by PrinceRidge or who was contacted by PrinceRidge** in connection with the Services under the Contract, then Oppidan shall pay to PrinceRidge 2.0% of the sale price of such property.

- Paragraph 15 - If PrinceRidge is successful in producing the buyer(s) that acquire any property or properties, Oppidan will pay PrinceRidge 1% for any future acquisition the buyer(s) make on any transaction with the Company for the following twelve months.

- Paragraph 5 – Oppidan agrees to indemnify PrinceRidge from and against any and all actions, expenses, claims and demands, including, without limitation, reasonable attorneys' fees and disbursements arising out of or in connection with the engagement agreement and/or the services PrinceRidge provided to Oppidan.

Id.

On or about April 16, 2010, Oppidan's in house counsel, Dave Scott, sent handwritten revisions to the Exclusive Engagement Agreement to Kirsch. (See April 16, 2010 email and revised engagement letter attached to the Kirsch Decl. as Exhibit "D".) The only revisions to the operative paragraphs detailed above were: 1) the Success Fee was reduced from 2.0% to 1.85%; 2) the period of months set forth in paragraph 3(c) was reduced from 18 months to 6 months (the parties ultimately agreed to 12 months); and 3) the percentage set forth in paragraph 3(c) was

[2] Section 3 of the Exclusive Engagement Agreement is entitled, "Compensation".

reduced from 2% to 1.85%. Id. The scope of the services PrinceRidge agreed to provide, including: 1) providing "other advisory and investment banking services"; and 2) contacting and introducing prospective investors to the Transaction, was not modified by Oppidan. Ryan Dep. 48:11-22. Nor was the definition of the services PrinceRidge was to provide, specifically, "Advisory Services", modified in any manner. Id. 42-43. Moreover, Oppidan never requested any carve outs of any nature for companies with which Oppidan may have had a pre-existing relationship. Id. 51:1-9; 77:17-19. Lastly, the final draft of the Exclusive Engagement Agreement also contained the following:

- Paragraph 7 – Notwithstanding anything expressed or implied herein to the contrary, the terms and provisions of this Section 7 and Sections 3(c), 5, 9, 10, 11, 12 and 14 shall survive the expiration of the Agreement.

See fully executed Exclusive Engagement Agreement attached to the Kirsch Decl. as Exhibit "E".

PrinceRidge Performs Pursuant to the Exclusive Engagement Agreement

On or about April 20, 2010, the parties entered into the fully executed Exclusive Engagement Agreement. Id. In accordance with the Exclusive Engagement Agreement, PrinceRidge began to provide "**Advisory Services**" to Oppidan. Kirsch Decl. ¶ 10. Specifically, PrinceRidge sought to identify firms and/or individuals who had available capital to deploy into the Portfolio of distressed real estate (the "Transaction"). PrinceRidge immediately commenced: 1) identifying entities interested in providing equity to a joint venture that might acquire the Properties; 2) identifying entities interested in providing loans to refinance the existing mortgages; or 3) identifying entities interested in purchasing one or all of the Properties outright. Id. at ¶ 11; Kirsch Dep. I 72:2-23; 91-92. In addition to the services detailed above, PrinceRidge prepared the "discussion materials" consistent with the Exclusive Engagement Agreement to provide the requisite information outlining the potential opportunity to clients. Kirsch Dep. I

71:2-13; (A true and accurate copy of the discussion materials is attached to the Kirsch Decl. as Exhibit "F"). The discussion materials were drafted to gauge the interest of prospective investors. Kirsch Decl. ¶ 12.

Over the period of months, PrinceRidge contacted eighty-four (84) separate corporate entities to discuss the Properties, and to attempt to introduce those entities to the Transaction. Kirsch Decl. ¶ 13; (A true and accurate copy of the list of entities PrinceRidge contacted is attached to the Kirsch Decl. as Exhibit "G".) PrinceRidge provided many of these entities with the discussion materials PrinceRidge prepared. To the extent any of the entities had any additional questions or issues regarding the Properties, PrinceRidge instructed its clients and potential investors to contact Oppidan directly. Kirsch Dep. I 103:2-12. Any bids that PrinceRidge received for the Properties were forwarded directly to Oppidan, without **any** commentary and/or guidance from PrinceRidge. Following the bid submissions, Oppidan directed PrinceRidge regarding the next steps, including whether Oppidan required additional information and/or a second round of bids. Id. 332:5-23.

PrinceRidge Introduces NRP to the Transaction

In connection with its Advisory Services, PrinceRidge contacted National Retail Properties ("NRP"). See Exh. "G"; Deposition of Matt Kirsch Volume II ("Kirsch Dep. II") attached to the Kirsch Decl. as Exhibit "H"; 351-352. NRP is a Real Estate Investment Trust ("REIT") that invests in income producing real estate across the country. Ryan Dep. 70:18-23. Kirsch was introduced to NRP in or about May, 2010, through a colleague at PrinceRidge. Kirsch Decl. at ¶ 17; Kirsch Dep. II 351:5-22. Kirsch sent NRP the discussion materials, and had multiple discussions with NRP's acquisitions department, specifically, Joshua Lewis, from May to June, 2010, regarding the Properties to determine if NRP had any interest in making an investment with Oppidan. Kirsch Decl. at ¶ 17; Kirsch Dep. II 354:6-10. Lewis informed Kirsch that NRP was interested in some of the Properties, and that NRP intended to submit a bid. Kirsch Decl. at ¶ 18. Lewis directed Kirsch to contact NRP's senior executive vice president, Jay Bastian, to continue the process. Id.

On June 24, 2010, Kirsch emailed Bastian and advised him that first round bids were due on June 25, 2010. Id. at ¶ 19; (A true and accurate copy of Kirsch's June 24, 2010 email is attached to the Kirsch Decl. as Exhibit "I"). On June 25, 2010, Bastian emailed Kirsch. In that email, Bastian never indicated that NRP was not interested in the Properties. Bastian also never indicated that NRP was not going bid on the Properties. Rather, Bastian abruptly informed Kirsch that NRP would not "be participating in [PrinceRidge's] process". Id.

Accordingly, Kirsch called Ryan to inquire if he knew why NRP chose not to "participate in [PrinceRidge's] process". Kirsch Decl. at ¶ 20; Kirsch Dep. II 356:7-25. Ryan informed Kirsch that Bastian was mistaken, and that Kirsch should continue to discuss the Transaction with NRP. Ryan stated that he had directed NRP to continue to speak with PrinceRidge, and participate in PrinceRidge's process. Kirsch Decl. at ¶ 20; Kirsch Dep. II 356-357.

As of June 25, 2010, however, NRP did not submit a bid for any of the Properties. See Kirsch Decl. at ¶ 21. Rather, Kirsch learned that NRP's head of acquisitions was conveniently in Minnesota at or about that time meeting with Gander Mountain and Camping World. See Email between Joe Ryan and Jay Bastian dated June 30, 2010 confirming that NRP was meeting with Gander Mountain attached to the Kirsch Decl. as Exhibit "J". As a result of NRP's seemingly subversive actions in seeking an end-around PrinceRidge's "process", Kirsch and others at PrinceRidge grew concerned that Oppidan was seeking to deny PrinceRidge's right to a Success

Fee. (See emails between Kirsch and PrinceRidge Managing Director and Senior Salesperson Tom Connors dated June 28, 2010 and July 7, 2010, attached to the Kirsch Decl. as Exhibit "K".)

NRP Purchases Ten (10) Properties from Oppidan for Over $100 Million

On July 26, 2010, NRP sent a Letter of Intent ("LOI") to Oppidan indicating its intent to purchase five (5) Properties for $50,470,996.00. Kirsch Decl. ¶ 23; (A true and accurate copy of the July 26, 2010 LOI is attached to the Kirsch Decl. as Exhibit "L"); Ryan Dep. 86:6-17. On or about August 17, 2010, NRP and Oppidan entered into a Real Estate Purchase and Sale Contract ("Contract 1"). Kirsch Decl. ¶ 24; (A true and accurate copy of Contract 1 is attached to the Kirsch Decl. as Exhibit "M").[3] Contract 1 represents the consummation of the sale of the Properties contemplated by the July 26, 2010 LOI. Ryan Dep. 87:1-8. The Properties identified in Contract 1 are contained in the Portfolio included in the Exclusive Engagement Agreement. Ryan Dep. 83-84. Pursuant to the Sixth Amendment to Contract 1, the final purchase price of the Properties was $50,370,996. Kirsch Decl. ¶ 25; (A true and accurate copy of the Sixth Amendment to Contract 1 is attached to the Kirsch Decl. as Exhibit "N").

On June 6, 2011, NRP sent another LOI to Oppidan indicating its intent to purchase five (5) **additional** Properties for $50,395,638. Kirsch Decl. ¶ 26; (A true and accurate copy of the June 6, 2011 LOI is attached to the Kirsch Decl. as Exhibit "O"); Ryan Dep. 91-92. On or about June 15, 2011, NRP and Oppidan entered into another Real Estate Purchase and Sale Contract ("Contract 2"). Kirsch Decl. ¶ 26; (A true and accurate copy of Contract 2 is attached to the Kirsch Decl. as Exhibit "P").[4] Contract 2 represents the consummation of the sale of the Properties contemplated by the June 6, 2011 LOI. Ryan Dep. 93:18-22. The Properties identified in Contract 2 are set forth in the Portfolio, and included in the Exclusive Engagement Agreement. Ryan Dep. 91-92. The final purchase price of the Properties contained in Contract 2 was $50,395,638. Kirsch Decl. ¶ 27; Exh. "P".

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[3] For the Court's information, the entities identified as the seller that include the acronym "KTJ", are all entities owned and controlled by Oppidan. Ryan Dep. 19:8-13.

[4] Again, the entities identified as the seller that include the acronym "KTJ", are all entities owned and controlled by Oppidan. Ryan Dep. 94:4-9.

Oppidan Breached the Exclusive Engagement Agreement

Despite consummating the transactions detailed above, and in complete disregard of PrinceRidge's demands, Oppidan failed to make the requisite payment due to PrinceRidge pursuant to the Exclusive Engagement Agreement. Ryan Dep. 53:1-6. PrinceRidge duly demanded payment, but Oppidan flat out refused. Kirsch Decl. ¶ 28. At his deposition, Ryan himself acknowledged that if PrinceRidge introduced Oppidan to the Transactions detailed above, and a sale was consummated, PrinceRidge would have been entitled to its Success Fee. Ryan Dep. 90-91. Despite that candid acknowledgment, Oppidan never made payment and, to date, Oppidan has **never** communicated any reason whatsoever directly to PrinceRidge for its failure to pay PrinceRidge the Success Fee to which it is entitled pursuant to the Exclusive Engagement Agreement. Kirsch Decl. ¶ 29.

In March, 2011, Oppidan drafted a "Pipeline Report". Ryan testified that a Pipeline Report is an internal Oppidan document that reports on projects that Oppidan is engaged in and their level of progress. Ryan Dep. 97:10-13. The March 13, 2011, report contains an entry that states, "Portfolio to NNN – JR – Be careful with NY guys". (A true and accurate copy of the March 13, 2011 Pipeline Report is attached to the Kirsch Decl. as Exhibit "Q".) Ryan testified that "Portfolio to NNN" refers to a sale of Properties to NRP, and that "JR" refers to him. Ryan Dep. 98:12-25. When questioned whether "Be careful with NY guys" refers to PrinceRidge, Ryan testified "It might be PrinceRidge. It might not be. I don't know." Id. 99:13-16. When asked whether Ryan had any discussions with anybody at Oppidan regarding whether Oppidan had to "Be careful with NY guys", Ryan stated, "Yeah, I don't recall."

Transactions Entered Into Between Oppidan and Other Entities PrinceRidge Contacted Pursuant to the Exclusive Engagement Agreement

As of 2010, Oppidan sold at least one other Property contained in the portfolio, the College Station property, to The Inland Real Estate Group of Companies, Inc. Inland was one of the companies that PrinceRidge contacted regarding the portfolio. Ryan Dep. 128:2-15. Moreover, Ryan testified at his deposition that since April of 2010, Oppidan has conducted business in some form or another with Cole Capital, Dougherty Funding, and Kimco. Ryan Dep. 123:21-23; 125:11-15; 129:1-7.

PrinceRidge Was Not Acting As A Broker

As set forth above, Oppidan retained PrinceRidge's Advisory Services in the spring of 2010, because it unsuccessfully sought to sell the Properties through its network of real estate brokers. Kirsch Decl. ¶ 31; Ryan Dep. 21:10-16. Attached to the Kirsch Decl. as Exhibit "R", are numerous examples of brokerage agreements Oppidan entered into with Stan Johnson Company ("Stan Johnson") and Upland Real Estate ("Upland") (the "Brokerage Agreements"). Stan Johnson's website confirms that they are a real estate broker. (A true and accurate copy of a portion of Stan Johnson's website is attached to the Kirsch Decl. as Exhibit "R".) Upland's website confirms the same. (A true and accurate copy of a portion of Upland's website is attached to the Kirsch Decl. as Exhibit "T".)[5]

[5] By contrast PrinceRidge's website describes PrinceRidge as a "full service investment bank with the experience and capital base necessary to provide trusted advice, intelligent solutions and superior execution to middle-market and small-cap clients." (A true and accurate copy of PrinceRidge's website is attached to the Kirsch Decl. as Exhibit "U".)

The engagement agreement Oppidan entered into with PrinceRidge, seeking PrinceRidge's "Advisory Services", is very different than Oppidan's real estate Brokerage Agreements in three (3) critical respects. First, each of the Brokerage Agreements define the party Oppidan is hiring as a "**broker**". Not one of them identifies the party that Oppidan is retaining as an "advisor". See Kirsch Decl. ¶ 33; Exh. "R".

Second, each of the Brokerage Agreements state that Oppidan "employs Broker as its exclusive agent to procure purchasers for [a property]. Broker is authorized to sell the [property]. . ." Id. None of this critical language applicable to brokerage agreements entered into by Oppidan, appears in the Exclusive Engagement Agreement with PrinceRidge. Kirsch Decl. ¶ 34; Exh "E".

Third, each of the Brokerage Agreements describes the broker's fee as a "commission". This is unlike the Exclusive Engagement Agreement, which defines PrinceRidge's fee as "compensation". See Kirsch Decl. ¶ 35; Exs "R" & "E". These terms are very different. Webster's dictionary defines "commission" as "a fee paid to an agent or employee for transacting a piece of business or performing a service". See Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/commission; Kirsch Decl. ¶ 35. The critical language in that definition, of course, is, "transacting a piece of business". Here, the Exclusive Engagement Agreement does not authorize PrinceRidge to "transact" anything. PrinceRidge did **not** have the authority to negotiate anything with any of the prospective investors, nor did PrinceRidge have the authority to bind Oppidan to a contract. See Kirsch Decl. ¶ 36. Rather, the Exclusive Engagement Agreement is clear that the principle task PrinceRidge was asked to perform was to identify potential buyers; introduce them to the Transaction; and perform other advisory or investment banking services as may be mutually agreed upon. Unlike a broker, PrinceRidge was **not** involved whatsoever in the negotiation of the Transaction. Kirsch Dep. I 163:9-16.

Notwithstanding PrinceRidge's performance as detailed above, Oppidan has never made any payments whatsoever to PrinceRidge pursuant to any of the provisions contained in the Exclusive Engagement Agreement. Ryan Dep. 53:1-18. PrinceRidge, in its capacity as an investment banker providing advisory services to Oppidan, performed pursuant to the Exclusive Engagement Agreement, but did not receive any payment for its services. Accordingly, PrinceRidge is entitled to summary judgment regarding its breach of contract claim.

LEGAL ARGUMENT

I. STANDARD OF LAW ON SUMMARY JUDGMENT

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When moving against the party who will bear the ultimate burden of proof on an issue, "'the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim.'" Kwon v. Yun, 606 F. Supp. 2d 344, 355 (S.D.N.Y. 2009) (quoting Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995)); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (noting that a "moving party is entitled to judgment as a matter of law [if] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." (internal quotations omitted)). Further, "[t]he party opposing summary judgment 'may not rely on conclusory allegations or unsubstantiated speculation . . .'" Karpova v. Snow, 402 F. Supp. 2d 459, 465 (S.D.N.Y. 2005) (quoting Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998)). Here, the documents and sworn deposition testimony confirm that there are no genuine issues of material fact and, as a matter of law, PrinceRidge is entitled to summary judgment.

II. PRINCERIDGE IS ENTITLED TO SUMMARY JUDGMENT REGARDING ITS BREACH OF WRITTEN CONTRACT CLAIM

It is well established that, under New York law, the elements of a breach of contract claim are: 1) the formation of a contract between the parties; 2) performance by the plaintiff; 3) the defendants' failure to perform, and; 4) resulting damages. See Diesel Props S.R.L. v. Greystone Bus. Credit II LLC, 631 F.3d 42, 52 (2d Cir. 2011); Harsco Corp. v. Segui, 91 F.3d 337, 338 (2d Cir. 1996); Flomenbaum v. New York University, 2009 WL 4350604, *8 (1st Dept. Dec. 3, 2009) (citing Clearmont Property, LLC v. Eisner, 58 A.D.3d 1052, 1055 (3d Dept. 2009)). Here, each and every one of the elements are satisfied.

First, there is no dispute that a contract existed. The Exclusive Engagement Agreement was entered into by PrinceRidge and Oppidan. Oppidan's counsel negotiated and revised the Exclusive Engagement Agreement; it was duly entered into by Joe Ryan on Oppidan's behalf and Matt Kirsch on behalf of PrinceRidge.

Second, PrinceRidge clearly performed pursuant to the Exclusive Engagement Agreement. As set forth above, PrinceRidge analysts spent months on the Oppidan project, contacting a total of 84 entities seeking to find a solution to the distressed real estate contained in Oppidan's portfolio. One of the entities contacted, NRP, purchased ten (10) of the Properties contained in the portfolio as a direct result of the introduction to the Transaction, as described *supra*, by Matt Kirsch at PrinceRidge. Kirsch had a number of telephone calls and emails by and between himself and Josh Lewis and Jay Bastian at NRP. Kirsch sent NRP the discussion materials PrinceRidge painstakingly created that provided NRP with the information it required to make an informed decision. NRP ultimately purchased those Properties for a total price of over **$100 million**.

Third, Oppidan breached section 3(a) of the Exclusive Engagement Agreement because Oppidan did not pay PrinceRidge the "Success Fee" for the successful closing of the sale of Oppidan's Properties to NRP. Rather, Oppidan sought an end around PrinceRidge's "process", which was complete the moment that PrinceRidge contacted NRP and introduced it to the Transaction, by conspiring with NRP to deny PrinceRidge its Success Fee. Oppidan's tactics were subversive and deliberate.[6]

Lastly, PrinceRidge was damaged as a result of Oppidan's breach. Pursuant to the Exclusive Engagement Agreement, PrinceRidge is owed at least 1.875% of $50,800,154.00 (Contract 1), or, $952,503.00. Of that amount, 20%, or, $101,600.00, is owed to another individual pursuant to a separate agreement recognized by both parties. Therefore, the total amount due to PrinceRidge as a result of the sales described in Contract 1 is at least $850,903.00. Furthermore, Pursuant to Contract 2, PrinceRidge is owed at least an additional 1.875% of $50,395,638, or, $944,918.00. Of that amount, again, 20%, or, $100,791.00, is owed to Steve Berchild pursuant to a separate agreement recognized by both parties. Therefore, the total amount due to PrinceRidge as a result of the sales described in the Contract 2 is at least an additional $844,127.00. Accordingly, the total amount due to PrinceRidge as a result of Contracts 1 and 2 is at least $1,695,030.00.

[6] Whether Oppidan had a pre-existing relationship with NRP is immaterial. The Exclusive Engagement Agreement did not contain any "carve-outs" for Oppidan's pre-existing relationships, and even though it does not matter, there is no evidence in the record whatsoever that NRP was familiar with the Transaction before PrinceRidge's introduction. Irrespective of whether NRP and Oppidan had conducted business together in the past, PrinceRidge **introduced Oppidan to the Transaction**, namely, the proposed sale of a portfolio of Properties. That is exactly what PrinceRidge was retained to do, and it is exactly what PrinceRidge did.

PrinceRidge is also owed amounts due to it pursuant to the "tail" provisions of the Exclusive Engagement Agreement, paragraphs 3(c) and 15. Unfortunately, Oppidan had completely obfuscated discovery regarding this matter and, accordingly, upon an award of Summary Judgment in favor of PrinceRidge, PrinceRidge respectfully respects a hearing before Magistrate Judge Cott to determine the appropriate amount of damages.[7] Despite repeated requests, Oppidan did not provide any of the sales information regarding the College Station property sold to Inland, or information regarding the business conducted with any of the entities Ryan admitted Oppidan conducted business with between April 2010, to the present and, accordingly, PrinceRidge is unable to calculate the full amount of its damages at this point in time.[8]

It is abundantly clear that each and every one of the elements necessary to find summary judgment in favor of PrinceRidge, and against Oppidan, regarding PrinceRidge's breach of contract claim is satisfied here. There is no question that: 1) a contract was formed by way of the Exclusive Engagement Agreement; 2) PrinceRidge performed pursuant to that contract by a) contacting 84 entities searching for an investor for Oppidan, and b) contacting and introducing NRP to the Transaction that was ultimately consummated; 3) Oppidan breached the Exclusive Engagement Agreement by not paying PrinceRidge its compensation; and 4) PrinceRidge was damaged as a result. Accordingly, PrinceRidge is entitled to summary judgment regarding its breach of contract claim.

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[7] Pursuant to Paragraph 5 of the Exclusive Engagement Agreement PrinceRidge's damages include the attorneys' fees and costs it expended prosecuting this litigation.

[8] Ryan also testified that at the time of his deposition that Oppidan was in negotiations with an entity to sell the Palm Beach Gardens property contained in the portfolio of Properties included in the Exclusive Engagement Agreement. Ryan, however, refused to disclose who that entity was citing confidentiality concerns. Ryan Dep. 106:14-22. PrinceRidge respectfully requests that the disclosure of this critical information be included in PrinceRidge's request for a damages hearing before Magistrate Judge Cott to determine whether the "confidential entity" was in fact one of the 84 entities contacted by PrinceRidge and introduced to the Transaction.

III. PRINCERIDGE DID NOT ACT AS A "BROKER"

Throughout this litigation Oppidan has argued that in performing its "Advisory Services", PrinceRidge was acting as a real estate broker. Oppidan has argued that because PrinceRidge does not possess a real estate broker's license, by law PrinceRidge is not entitled to any monies from Oppidan. That argument, disingenuous and "after the fact", fails for a host of reasons. Pursuant to well established New York case law, PrinceRidge is not required to have a license to collect the Success Fee which it is clearly entitled. In this case, PrinceRidge acted as a "finder".

New York courts distinguish between finders and brokers in real estate transactions. See Northeast Gen. Corp. v. Wellington Adv., 82 N.Y.2d 158, 162-63 (Ct. App. 1993) ("a finder is not a broker, although they perform some related functions."); Train v. Ardshiel Assoc., Inc., 635 F.Supp. 274, 279 (S.D.N.Y. 1986). "Distinguishing between a broker and finder involves an evaluation of the quality and quantity of services rendered." Northeast Gen. Corp., 82 N.Y.2d at 162-63. A "finder" has the responsibility to find potential buyers or sellers and bring parties together; a finder has no obligation or authority to actually negotiate the transaction. Northeast Gen. Corp., 82 N.Y.2d at 163. Essentially, a finder completes his work merely by facilitating the exchange of information between two parties, which exchange results in the parties entering into negotiations to consummate a deal. Id. "It is possible for a finder to accomplish his service by making only two phone calls and, if the parties later conclude a deal, he is entitled to his commission." Minichiello v. Royal Bus. Funds Corp., 18 N.Y.2d 521, 527 (Ct. App. 1966), cert. denied 389 U.S. 820 (1967)).

Brokers, on the other hand, have far greater involvement in the ultimate transaction, and they are required to act as "an intermediary between two parties in bringing about a contractual meeting of the minds." Polo v. Lordi, 261 N.Y. 221, 224 (Ct. App. 1933). The role of a broker (unlike a finder), "carries a defined fiduciary duty to act in the best and more involved interests of the principal." Northeast Gen. Corp., 82 N.Y.2d at 163. Finders, on the other hand, do not inherently owe their clients a fiduciary duty, and as such, they are not required to maintain a license in order to receive payment for their services. Id. ("The finder is required to introduce and bring the parties together, without any obligation or power to negotiate the transaction, in order to earn the finder's fee.") The New York Court of Appeals explained that, in addition to the nomenclature of "finder" or "broker" used in an agreement, to determine whether a fiduciary duty is owed to their clients, courts should look to the scope of the services agreed to in writing between the parties. Id.

Here, PrinceRidge facilitated the transaction that ultimately resulted in NRP's purchasing ten (10) of the Properties from Oppidan. PrinceRidge introduced NRP to Oppidan for discussions related to purchasing the Properties. Following this introduction, Oppidan consummated two transactions with NRP in which NRP purchased ten (10) of the Properties for over $100 million. Importantly, not only with respect to the transaction between Oppidan and NRP, but with respect to any of the potential transactions, PrinceRidge did not even have the authority to negotiate the sale and purchase of the Properties. PrinceRidge's involvement in these transactions ended immediately after it introduced Oppidan to NRP. Under these undisputed facts, there can be no question that PrinceRidge acted as a "finder," not a "broker," in the transaction between Oppidan and NRP. See Northeast Gen. Corp., 82 N.Y.2d at 162-63.

In Northeast Gen. Corp., plaintiff-finder Northeast Gen. Corp. had a written agreement with its client, Wellington, pursuant to which Northeast was entitled to a "Completion Fee" when a transaction closed between Wellington and any party "introduced and/or presented by [Northeast] to [Wellington]." Id. at 160-61. "By its terms, the understanding between these parties called for a simple service: the finder was to introduce purchaser "candidates" to

Wellington for which the finder would be paid a finder's fee if a completed transaction ensued." Id. at 161. Northeast brought Wellington a potential purchaser with whom Wellington ultimately entered into a purchase agreement. Id. Wellington failed to pay the Completion Fee, and Northeast sued to recover its fee. Id. The trial court initially found in favor of Northeast, but on Wellington's motion, it set aside the verdict "based on a newly notched fiduciary-like duty on finders." Id. The Appellate Division affirmed, and the Court of Appeals reversed, finding that Northeast's representative acted in "a traditional finder function under a finder's agreement, and his role ceased when he found and presented someone." Id. at 162.

The Court of Appeals explained that "a finder is not a broker." Id. (emphasis added). The Court found that Northeast was a finder, explaining: "this finder had no explicit or implied power to bind Wellington. This finder did not have the power to negotiate the transaction. This finder did not have the power to do anything except find and introduce prospects." Id. at 164. Based on this reasoning, the Court of Appeals concluded that Northeast was not a broker and did not owe a fiduciary duty to Wellington. Id. at 164 Therefore, there was no basis upon which Wellington could rightfully withhold Northeast's finder's fee. Id. at 164-165.

Similarly, here, PrinceRidge is contractually entitled to a fee for its "Advisory Services," which include the limited role of contacting and introducing Oppidan to prospective buyers of the Properties. (See Exclusive Engagement Agreement, p. 1-2.) PrinceRidge earned its Success Fee when it contacted and introduced Oppidan to NRP, and NRP subsequently purchased ten (10) of the Properties. Id.; Northeast Gen. Corp., 82 N.Y.2d at 163. Like the plaintiff in Northeast Gen. Corp. v. Wellington, PrinceRidge did not have the authority to negotiate the deal between Oppidan and NRP regarding the Properties. Kirsch Decl. ¶ 36; Northeast Gen. Corp., 82 N.Y.2d at 164. PrinceRidge also did not have any power to bind Oppidan. Kirsch Decl. at ¶

36; Northeast Gen. Corp., 82 N.Y.2d at 164. PrinceRidge's power under the Exclusive Engagement Agreement was limited to introducing Oppidan to potential buyers of the Properties. Kirsch Decl. at ¶ 36; Kirsch Dep. I 163:9-16; Northeast Gen. Corp., 82 N.Y.2d at 164.

PrinceRidge's work was complete when it facilitated the exchange of information between Oppidan and NRP, and that exchange of information resulted in Oppidan entering into negotiations to consummate a deal with NRP. Therefore, PrinceRidge was a "finder" in this transaction. See Northeast Gen. Corp., supra, 82 N.Y.2d at 163. Because PrinceRidge fulfilled its obligations under the Engagement Agreement and had no further involvement in the deal after introducing NRP to Oppidan for purposes of purchasing the Properties, PrinceRidge is entitled to the contractual fee set forth in the Engagement Agreement as a "finder" under New York law. See Northeast Gen. Corp., 82 N.Y.2d at 163, supra.

PrinceRidge is entitled to summary judgment on its breach of contract claim because it is a finder who performed under the written agreement. See id. at 161-63 (remitting case to trial court for appropriate proceedings in which the difference between a "finder" and "broker" is recognized; further noting that a finder does not owe its client a fiduciary duty and receives its commission merely by bringing parties together who ultimately consummate a deal). PrinceRidge did not provide real estate brokerage services, and this Court should not find otherwise.

CONCLUSION

This is clearly one of those instances where the Court should exercise its powers and award summary judgment to PrinceRidge. Oppidan should not be permitted to conduct an end around a contract that PrinceRidge performed in good faith, which resulted in a substantial benefit to Oppidan. Oppidan received approximately $100 million, if not more, as a result of PrinceRidge's services, and now seeks to avoid its payment obligations in their entirety. To allow Oppidan to benefit from this clear breach would violate every tenant of contract law. For the foregoing reasons and authorities, PrinceRidge respectfully requests that this Court enter an Order granting it summary judgment along with such other relief as the Court deems just and proper.

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Respectfully submitted,

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